

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of AARON DOUGLAS SMITH,
CHELSEA MARIE SMITH, and JULIE ANN
SMITH, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MELANIE ANN SMITH,

Respondent-Appellant,

and

WAYNE DOUGLAS SMITH, JR.,

Respondent.

UNPUBLISHED

August 21, 2008

No. 283285

Oakland Circuit Court

Family Division

LC No. 05-712404

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Respondent Melanie Smith appeals as of right from the trial court order terminating her parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g), and (j). Respondent pleaded no contest to the petition for permanent custody, and following a best interests hearing, the trial court found that the children's best interests did not preclude termination of respondent's parental rights. MCL 712A.19b(5). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Respondent first argues that the trial court erred by failing to appoint substitute counsel upon her request. In child protective proceedings, this Court applies by analogy the principles of effective assistance of counsel developed in the context of criminal law. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). "An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "Appointment of a substitute counsel is warranted only upon a showing of a good cause and where substitution will not unreasonably disrupt the judicial process." *Id.* "A defendant's assertions that he lacks confidence in his trial counsel are not good

cause to substitute counsel.” *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). Respondent’s complaint that trial counsel did not return her phone calls did not constitute good cause for substitution where the referee stated that he would speak to trial counsel and respondent did not complain again about her counsel.

Respondent also argues that her trial counsel was ineffective for failing to consult with her before trial and failing to call witnesses. Because respondent did not move for an evidentiary hearing or new trial, our review is limited to the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish ineffective assistance of counsel, a respondent must show (1) that counsel’s failure fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and (3) that the result of the proceedings was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Respondent did not demonstrate that counsel’s performance fell below an objective standard of reasonableness. We note that the decision to call a witness is a matter of trial strategy and may only constitute ineffective assistance of counsel where it deprives the respondent of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Respondent testified regarding her defense, and the existing trial record does not include affidavits or other evidence of other witnesses’ potential testimony.

Further, the outcome of the proceedings was not affected by trial counsel’s performance where the case against respondent was strong. The children were in foster care in Genesee County, were returned to respondent and their father for seven months, and then were removed by Oakland County. More than two years passed, and the children had special needs for consistency and stability and would have been harmed by a return to respondent and another removal. When the trial court made its best interests determination, the court stated that the children did not have time to give respondent another chance. For these reasons, the outcome of the proceedings was not affected by counsel’s performance.

Affirmed.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens